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SPECIAL COMMITTEE
ON AGING

United States Senate

WASHINGTON, D.C. 20510

October 9, 1992

RECEIVED

Mr. William Kelly
Post Office Box 530956
Miami, Florida 33153

DEC 4 1992

FCC - MAIL ROOM

92-223

Dear William:

Thank you for sharing your views with me regarding the broadcasting of indecent material on the public airwaves and Senate consideration of S. 1504, the Public Telecommunications Act.

Public broadcasting stations are independently operated and receive grants and purchase certain programming material from the Corporation for Public Broadcasting (CPB) and other organizations which support public broadcasting. Each local station makes its own programming decisions. According to federal law, these decisions must reflect the standards of decency shared by the citizens of that local community. The Federal Communications Commission (FCC), which enforces that law, sets overall standards for all broadcasters, including those television and radio stations which receive support from the CPB.

On June 3, 1992, Senator Byrd offered an amendment to S. 1504, which prohibits the broadcasting of indecent programming between 6 a.m. and 10 p.m. by any public radio or television station that goes off the air at or before 12 midnight, or between 6 a.m. and 12 midnight for any other public station. This amendment was adopted by the Senate by a vote of 93-3. Enclosed is a copy of the amendment and the accompanying vote.

As you will see in reading the amendment, the Senate did not legalize anything at all by approving the Byrd amendment. Instead, we acted to restrict, during extended prime-time hours, what might otherwise have been broadcast had the Byrd amendment not been considered. I understand and share your concern over the content of public and commercial broadcasts. It is with this concern in mind that I voted in favor of Senator Byrd's amendment. While Congress could have taken a stronger step in this direction, I assure you

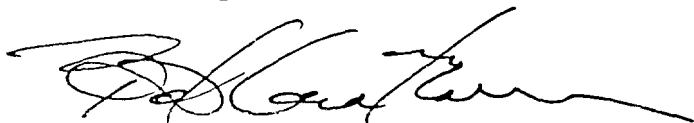
October 9, 1992
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that the Byrd amendment in no way relaxed federal regulation of indecent programming.

Once again, thank you for contacting me about this important issue. Please let me know whenever I can be of service.

With kind regards,

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Claitor", written in a cursive style.

United States Senator

BG/vaw

Enclosure

BYRD AMENDMENT NO. 1859

Mr. BYRD proposed an amendment to the bill S. 1504, supra, as follows:

At the appropriate place, insert the following new section:

BROADCASTING OF INDECENT PROGRAMMING

SEC. . (a) FCC REGULATIONS.—The Federal Communications Commission shall promulgate regulations to prohibit the broadcasting of indecent programming—

(1) between 6 a.m. and 10 p.m. on any day by any public radio station or public television station that goes off the air at or before 12 midnight; and

(2) between 8 a.m. and 12 midnight on any day for any radio or television broadcasting station not described in paragraph (1).

The regulations required under this subsection shall be promulgated in accordance with section 553 of title 5, United States Code, and shall become final not later than 180 days after the date of enactment of this Act.

(b) REPEAL.—Section 808 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1989 (Public Law 100-459; 102 Stat. 2228), is repealed.

June 2, 1992: Senator Byrd filed his amendment and asked that it be printed in the Congressional Record. Here is the text of that amendment.

S 7424

CONGRESSIONAL RECORD—SENATE

June 3, 1992

The PRESIDING OFFICER (Mr. ROSS). Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 93, nays 3, as follows:

[Rollcall Vote No. 113 Leg.]

YEAS—93

Adams	Durenberger	McConnell
Akaka	Exon	Mikulski
Baucus	Ford	Mitchell
Bentsen	Fowler	Moynihan
Biden	Garn	Murkowski
Bingaman	Glenn	Nickles
Bond	Gore	Nunn
Boren	Gorton	Packwood
Bradley	Graham	Pell
Breaux	Gramm	Presler
Brown	Grassley	Pryor
Bryan	Harkin	Reid
Bumpers	Hatch	Riegle
Burdick	Hatfield	Robb
Burns	Heflin	Rockefeller
Byrd	Hollings	Roth
Chafee	Inouye	Sanford
Coats	Kassebaum	Sarbanes
Cochran	Kasten	Sasser
Cohen	Kennedy	Shelby
Conrad	Kerrey	Simon
Craig	Kerry	Simpson
Cranston	Kohl	Smith
D'Amato	Lautenberg	Specter
Danforth	Leahy	Stevens
Daschle	Levin	Symms
DeConcini	Lieberman	Thurmond
Dixon	Lott	Wallop
Dodd	Lugar	Warner
Dole	Mack	Wellstone
Domenici	McCain	Wofford

NAYS—3

Jeffords Metzenbaum Wirth

NOT VOTING—4

Helms Rudman
Johnston Seymour

So the amendment (No. 1859) was agreed to.

June 3, 1992: The full Senate voted 93-3 in favor of the Byrd amendment, which was then adopted and became part of the Senate version of S. 1504. This is the breakdown of the Senate vote.

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MORALITY IN MEDIA, INC. 475 RIVERSIDE DRIVE, NEW YORK, NY 10115 (212) 870-3222

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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DEC 4 1992

December 3, 1992

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Ms. Donna Searcy

Secretary

Federal Communications Commission

1919 M. Street N.W.

Washington, D.C. 20554

Re: Proceeding to Implement
Congressionally Mandated
Regulations Prohibiting the
Broadcast of Indecent
Programming Between 6 A.M.
and Midnight-Docket 92-223

In my conversations with Peter Tenhula, Esq. of the Office of General Counsel of the FCC of December 1, 1992 and December 2, 1992, I explained to him that my secretary had called the FCC "Information Management" on November 12, 1992 asking for a copy of the Notice of Proceeding. She was directed to obtain same from Downtown Copy Center. He furnished her with the Docket Number.

On November 13, 1992 she called Downtown Copy Center and ordered a copy of the Notice of Proceeding to be sent to me, Paul J. Mc Geady, Esq., 475 Riverside Drive, New York, N.Y. 10115. They indicated they would comply with charges of seven cents a page plus \$15 dollars per hour for retrieval.

On November 18, 1992 my Secretary called again to Downtown Copy Center, since the Notice of Proceeding had not arrived. She was told that they are not untimely unless they fail to respond in one week from original order.

At 11:30 A.M. on December 1, 1992 my secretary called again. One, Mary Junk, she was told, would call me on this matter. To date Mary Junk has not called and I have since determined that the last date for comments was November 23, 1992.

For all of the above we respectfully request that this late filing of comments be excused and that the same be accepted for consideration. Mr. Tenhula indicated that we can file anything we want with no guarantee that it will be accepted by the Commission. If these comments are determined as not accepted as Formal Comments we request that they be accepted as Informal Comments which, Mr. Tenhula informs me, may normally be filed at any time. We enclose nine copies so that five may be given to the Commissioners.

Here then are our comments for the consideration of the Commission:

1. We do not believe that the validity of these regulations is controlled by Act II, 932 F.2d 1504 (D.C. Cir. 1991) for the simple reason that Congress has acted since that decision and has set out a new statute not in issue in Act I or Act II.

2. It should be noted that Congress made no attempt to Amend 18 U.S.C. 1464 which remains as the controlling statute.

3. The only United States Supreme Court ruling on the validity of 18 U.S.C. 1464 is FCC v. Pacifica Foundation.

4. That case and the FCC Brief to the United States Supreme Court in ACT II do not militate against the concept that 18 U.S.C. 1464 literally and actually applies 24 hours a day.

5. It is our opinion that regardless of ACT II (which was not directly called upon to decide whether or not the statute applied 24 hours a day) that the statute so applies.

6. The action of Congress in 1992 in adopting the Byrd Amendment, No. 1859 to Bill S.1504 was, in our opinion, misguided in that it gives a decided implication that indecent programming must be permitted between 12 Midnight and 6 AM. This was, it should be noted, not done directly (since the statute was not amended) but relates only to a time when the statute must be enforced.

7. While it is true that this Amendment was adopted under the shadow of ACT II, it should be further noted that Mr. Byrd on the floor of the Senate, June 2, 1992 (Cong. Record S.7308) indicated that his purpose was to extend "the restriction to broadcasts that occur during the hours of 6 AM to Midnight."

8. There is no indication, however, in this statutory history that the Congressional Intent was to legalize indecency between 12 Midnight and 6 AM, but only a recognition that the D.C. Circuit ruling existed and that the U.S. Supreme Court had denied review. The attached letter from Senator Graham of Florida dated October 9, 1992 addressed to one, William Kelly of Miami Florida states in part:

"As you will see in reading the Amendment the Senate did not legalize anything at all by approving the Byrd Amendment. Instead, we acted to restrict during extended prime time hours, what might otherwise have been broadcast had the Byrd Amendment not been considered. ...While Congress could have taken a stronger step in this direction, I assure you that the Byrd Amendment in no way relaxed Federal regulation of indecent programming."

9. If the Byrd Amendment did not legalize Indecent Programming between 12 Midnight and 6 AM (and was not intended to do so) then the FCC has leeway to regulate such programming between those hours if such regulation can be justified. It is our belief that the Briefs filed in the U.S. Supreme Court by the Solicitor General, Amicus and Intervenors justify that regulation under United States Supreme Court and other precedents.

10. We, therefore, urge the FCC not to adopt any regulations that will preclude or freeze its ability to regulate indecency between 12 Midnight and 6 AM.

11. In passing, we state our belief, that for the reasons given in the above

Briefs filed with the United States Supreme Court, that Honorable Court will uphold a properly worded restriction on indecency 24 hours a day, be that one adopted by the FCC or Congress.

12. It is further our belief that the refusal to review ACT II by the United States Supreme Court (which of course establishes no precedent) was occasioned by the fact that the word "indecent" was too "bare bones". That Court does not necessarily agree that the Statutory Definition is identical with the FCC formulation. In fact in Pacifica the Supreme Court did define "Indecent" to mean "Non Conformance with Accepted Standards of Morality". If that is the statutory definition, it is vague and needs some elucidation and clarification. If the Supreme Court were to use their own definition then we would have a continuum of words and actions that could or would be non-conformal ranging from vulgar remarks, profanity, swear words, nudity, graphic sex, sodomy, masturbation and orgies. It was probably this lack of adequate definition that moved some of the justices not to grant review on the theory that some milder forms of indecency should be permitted. It is not reasonable to believe that the United States Supreme Court (or the D.C. Circuit) would take such a doctrinaire approach to the word "indecent" as used in the broadcast medium to require that sodomy, masturbation, excretion and orgies in graphic color detail are to be permitted between 12 Midnight and 6 AM in our living rooms, if the program taken as a whole has literary or artistic value.

In conclusion, we ask that either in the regulations you adopt to implement the Byrd Amendment or in the comment that accompanies the same, that you make clear that there is no "open window" from 12 Midnight to 6 AM created by the Byrd Amendment.

Respectfully submitted,

Morality In Media, Inc.

By Paul J. McGeady
Paul J. McGeady
General Counsel

PJM/lc